No. 82-1414

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRATT-FARNSWORTH, INC., ET AL., PETITIONERS

v.

CARPENTERS LOCAL UNION NO. 1846, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to remedy an alleged breach of a collective bargaining agreement, a federal district court may decide whether a unit is appropriate for collective bargaining where determination of that issue is necessary to a resolution of the contract claim and there is no assured procedure for obtaining a National Labor Relations Board determination of the issue.

2. Whether the court of appeals properly remanded for further proceedings the issue of whether the plaintiffs were required to exhaust the contract grievance and arbitration procedures before bringing suit.

3. Whether the complaint states a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1, insofar as it alleges that certain contractors have engaged in a concerted refusal to deal with other contractors who hire union workers or who do not create "double breasted" union-nonunion arrangements.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A94) is reported at 690 F.2d 489. The opinion of the district court (Pet. App. C1-C32) is reported at 511 F. Supp. 509.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1982. A petition for rehearing was

denied on January 5, 1983 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth at Pet. App. D1-D7.

STATEMENT

1. Petitioner Pratt-Farnsworth, Inc. ("Farnsworth") is a construction company in the New Orleans area and a member of petitioner Associated General Contractors of Louisiana, Inc., New Orleans District ("AGC-New Orleans"). Petitioner Halmar, Inc. ("Halmar") is also a construction company in the New Orleans area and a member of petitioner Associated General Contractors of Louisiana, Inc., At Large District ("AGC-At Large"). AGC-New Orleans negotiated a collective bargaining agreement ("the Craft Agreement") for a multiemployer bargaining unit with the Carpenters District Council of New Orleans and Vicinity. Farnsworth is a signatory to this agreement. (Pet. App. E4-E5.)[1]

Respondents—two local unions which are members of the Carpenters District Council ("the Unions") and three employee benefit funds ("the Funds") to which the agreement obligates a signatory employer to make contributions—brought suit against Farnsworth, Halmar and the two AGC branches in the United States District Court for the Eastern District

[1] "Pet. App. E" references are to the allegations of the complaint, which must be accepted as true at this stage of the case since the district court granted petitioners' motion to dismiss the complaint (Pet. App. C32).

of Louisiana, alleging causes of action under Section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 185(a); the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1001-1361; and the Sherman and Clayton Antitrust Acts, 15 U.S.C. 1-7 and 12-27 (Pet. App. E3). The gravamen of the Section 301 and ERISA claims is that Farnsworth and Halmar are "a single integrated business enterprise" with "common ownership and management, centralized control of labor relations, sharing of equipment and other assets, and employees" (Pet. App. E4 ¶ 5); that, during the term of the Craft Agreement, "Farnsworth conspired with the knowledge and assent of the AGC and unknown labor persuaders * * * to establish and operate Halmar in order to circumvent and evade the Craft Agreement provisions and create a union-free environment" (*id.* at E6 ¶ 9); and that Farnsworth and Halmar thus failed to abide by the terms of the Craft Agreement, including the obligation to submit fringe benefit contributions on behalf of their employees to the Funds (*id.* at E9-E10).

The antitrust claim, insofar as relevant here, is that Farnsworth, Halmar and the two AGC branches have conspired (Pet. App. E6 ¶ 10(b)):

> To eliminate the [Unions] from the building and construction industry in New Orleans and vicinity by entering into agreements with owners and builders, whereby such owners and builders utilize contractors who do not have agreements with the [Unions].

The complaint requested, *inter alia*, that the Unions and the Funds be awarded treble damages for the antitrust violations (Pet. App. E11 ¶ 3), and that Farnsworth, Halmar and the two AGC branches be

ordered (1) "to abide by the terms and conditions of the Craft Agreement retroactively from May 1, 1971, to date, and any amendments, modifications or extensions and any new agreements entered into [with] the A.G.C." (*id.* at E12 ¶ 9), and (2) to pay to the trustees of the Funds the full amount determined to be due and owing for the period May 1, 1971 to date (*id.* at E12-E13 ¶¶ 10, 12).

2. The district court granted the defendants' motions to dismiss the complaint (Pet. App. C1-C32). It held that AGC-New Orleans and AGC-At Large were not proper defendants to the Section 301 and ERISA claims because they had never signed the collective bargaining agreement with the Unions (Pet. App. C5-C7). The court dismissed the Section 301 and ERISA claims against Farnsworth on the ground that the plaintiffs had never alleged any breach of the collective bargaining agreement on the part of Farnsworth in regard to its own employees (Pet. App. C13).

As to Halmar, the court dismissed the Section 301 and ERISA claims on the ground that it had no authority to determine that Farnsworth and Halmar were a single employer or alter egos without also determining the appropriate bargaining unit of their employees, which, it held, would be an impermissible invasion of the jurisdiction of the NLRB (Pet. App. C7-C10, C12-C14). Additionally, the court held that dismissal of the Section 301 and ERISA claims as to all defendants was required because of the plaintiffs' failure to exhaust the contractual grievance procedures provided in the collective bargaining agreement (Pet. App. C10-C12, C14).

Finally, the district court dismissed the antitrust allegations because it decided that the bargaining agreement fell within certain nonstatutory exemptions

to the antitrust laws, and that the plaintiffs' causes of action were in reality labor law issues parading as antitrust claims (Pet. App. C14-C32).

3. a. The court of appeals affirmed in part and reversed in part (Pet. App. A1-A94). The court agreed with the district court that the absence of a contractual relationship between AGC-New Orleans or AGC-At Large and the Unions requires dismissal of the Section 301 claim against the two AGC defendants (Pet. App. A9-A14). It held, however, that the district court had improperly dismissed the Section 301 claims against Farnsworth and Halmar.

As to Farnsworth, the court of appeals concluded that the plaintiffs' claim for relief was sufficient to afford them "an opportunity to prove that Farnsworth refused to pay contributions on behalf of those employees who no one contests are Farnsworth's own" (Pet. App. A15). As to Halmar, the court acknowledged that the problem was more difficult since "Halmar never signed the collective bargaining agreement; therefore, unless the plaintiffs can establish an alternative ground for holding Halmar to the agreement, Halmar must be treated the same as the nonsignatory AGC defendants" (*ibid.*). The court concluded that the plaintiffs' complaint could be read as stating a claim under Section 301 against Halmar for breach of the collective bargaining agreement on the basis of either "the single employer theory or the alter ego theory developed by the Board in unfair labor practice cases under the NLRA" (Pet. App. A18).[2]

The court of appeals then considered the question whether a district court, in an action for breach of

[2] The court also concluded that plaintiffs had stated a claim under ERISA on the same two theories (Pet. App. A69-A70).

contract under Section 301 in which single employer or alter ego status was alleged as a basis for recovery, would be empowered to determine the appropriateness of the bargaining unit.[3] It concluded that the district court had such authority, rejecting the contention that a unit determination by the district court would be an invasion of the exclusive jurisdiction of the NLRB and contrary to this Court's decision in *South Prairie Construction Co.* v. *Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800 (1976) (*"Peter Kiewit"*).[4] (Pet. App. A32-A58.)

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[3] The court noted that a "finding of single employer status does not by itself mean that all the subentities comprising the single employer will be held bound by a contract signed only by one. Instead, having found that two employers constitute a single employer for purposes of the NLRA, the Board then goes on to make a further determination whether the employees of both constitute an appropriate bargaining unit" (Pet. App. A20). In making the latter determination, the Board focuses on the "community of interests" of the employees involved (*id.* at A20-A21). On the other hand, "the focus of the alter ego doctrine * * * is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations" (*id.* at A26). When "the Board makes a finding that a non-signatory employer is the alter ego of a signatory employer which has voluntarily agreed to recognize the union's representative status in a unit stipulated in the collective bargaining agreement, the Board generally will not reconsider the unit under the community of interests test, but will simply make a far more limited determination whether the stipulated unit is repugnant to any policy embodied in the NLRA" (*id.* at A28).

[4] In *Peter Kiewit*, the union had filed an unfair labor practice charge with the Board against a union contractor and a non-union contractor, alleging that they were a single employer and that the contract entered into by the union con-

b. With regard to the district court's alternative ground for dismissal of the plaintiffs' Section 301 and ERISA claims—the failure of the Unions and the Funds to exhaust grievance procedures outlined in the collective bargaining agreement—the court of appeals concluded that the district court's failure to address the scope of the arbitration provisions of the agreement and the contract language regarding waiver, together with the incomplete nature of the record, made summary disposition inappropriate. Accordingly, the court of appeals remanded the exhaustion issue to the district court for further consideration. (Pet. App. A72-A75.)

c. As to the plaintiffs' antitrust claims, the court of appeals held that the defendants' alleged conduct was not protected by either the statutory or nonstatu-

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tractor was binding on the non-union contractor. The Board found that the two contractors were separate employers and dismissed the complaint. The District of Columbia Circuit reversed, holding that the two contractors were a single employer. Rather than remanding for a determination by the Board on the appropriateness of the bargaining unit, the court further held that the contract unit was also appropriate for the non-union contractors' employees and that the two contractors had therefore committed an unfair labor practice by refusing to recognize the union as the representative of the non-union contractor's employees or to extend to them the terms of the collective bargaining agreement. This Court affirmed the court's determination on the single employer issue but vacated its holding that the employees of the two companies constituted an appropriate bargaining unit. The Court held that, "[s]ince the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed,' * * * we think the function of the Court of Appeals ended when the Board's error on the 'employer' issue was 'laid bare.'" *Peter Kiewit, supra*, 425 U.S. at 805-806.

tory labor exemptions to the antitrust laws (Pet. App. A78-A80). While finding that "most of the plaintiffs' antitrust pleadings clearly do not allege antitrust injury," the court further found that "[c]loser inspection of the pleadings reveals two theories which do allege anticompetitive effects outside of the labor market *per se*" (*id.* at A86). The court explained (*ibid.*):

> The first [theory] is that defendants have engaged in a concerted refusal to deal not with the Unions themselves, but with other contractors who hire union workers. The second involves a concerted refusal to deal with contractors who do not create "double breasted" union-non-union arrangements.

The court cautioned, however, that its holding that "a cause of action exists under the antitrust laws because of restraints at the level of contractor services * * * does not necessarily point to the Unions or the Funds as the natural plaintiffs who are entitled to bring that cause of action" (Pet. App. A90). Because the standing issue had "neither [been] addressed nor briefed by either of the parties," the court directed it "to the district court's attention on remand, so that the court can determine which of the Unions or Funds are proper parties to this case after full development of the factual and legal issues by the parties" (*id.* at A91).

DISCUSSION

1. The first two questions presented by the petition (Pet. i) are essentially an attack on the holding of the court of appeals that, in the "narrow set of circumstances in which neither side has sought to invoke the Board's powers to determine an appropriate bar-

gaining unit, and a federal court is called upon to remedy an alleged breach of contract, * * * the district court may decide the appropriateness of the bargaining unit, where a decision on that issue is essential to a resolution of a breach of contract claim" (Pet. App. A48). As we shall explain, however, that holding is consistent with decisions of this Court regarding the scope of a court's jurisdiction under Section 301 of the LMRA and the law to be applied in such suits. Moreover, as we shall further explain, the position taken by the court of appeals is especially justified where, as appears to be the case here, a Section 8(f) (29 U.S.C. 158(f)) construction industry prehire agreement is involved, because there is no easy or obvious way to obtain Board resolution of the unit question in such cases. In any event, we submit that review of this issue would be premature because it is unclear at this stage of the proceedings whether, or to what extent, the district court would be required to make a unit determination.

a. As the court of appeals noted, Congress directed the courts in Section 301 suits "to create a federal common law of contract, fashioned from the policy of our national labor laws, applicable to collective bargaining agreements" (Pet. App. A49, citing *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957)). The court added (Pet. App. A49):

> We are faced here with one of the most fundamental questions that can arise in a contract suit, namely: who is bound by this contract? To say that the courts and not the Board are solely entitled to pass upon contractual disputes and at the same time to deny the courts the power to determine in a fashion consistent with the policy of our national labor laws the identity of the par-

sons or entities obligated by the contract is self-contradictory. If anything, the power to enforce a contract must necessarily include the ability to decide who is bound by the contract. No question is more basic to the existence of contractual rights.

The court of appeals' conclusion that unit determinations may be made by federal district courts in Section 301 actions is consistent with *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). There, this Court held that a district court has jurisdiction to compel arbitration on the question of work assignments as between two unions, even though the resulting arbitration might touch upon representation matters that could be decided by the Board (*id.* at 268). The Court added that its recognition of the district court's power to make such a determination did not infringe upon the Board's paramount authority over representation matters: "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence" (*id.* at 272). See also *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975) (footnote omitted) ("federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws"); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-86 (1982) (same).[5]

[5] The court of appeals noted that "the analysis suggested by *Connell* is even stronger when claims are brought under ERISA. There can be no doubt that ERISA provides a remedial scheme independent of the NLRA. To the extent that collateral labor law issues arise in the course of an ERISA claim,

Nor is the decision of the court of appeals here contrary to that of this Court in *Peter Kiewit*. As the court of appeals correctly pointed out (Pet. App. A42), in holding that the D.C. Circuit erred in deciding a unit issue that had not previously been considered by the Board, this Court in *Peter Kiewit* "was applying a time-honored principle relating to appellate review of an agency determination." See, *e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). It was not addressing the very different question presented here, concerning the power of a district court in a Section 301 suit to make a unit determination where such a determination is necessary for the court to decide a contract issue that it is empowered to decide.

b. There is an additional consideration supporting the court of appeals' holding in this case. As the court noted (Pet. App. A94 corrected n.11), the doctrine of primary jurisdiction usually has no application where the plaintiffs could not invoke administrative action. See *Rosado* v. *Wyman*, 397 U.S. 397, 406 (1970). Board remedies are available to a union seeking to compel two companies to comply with terms of a Section 9(a) (29 U.S.C. 159(a)) agreement (*i.e.*, an agreement with a union that has majority support) where one of the companies has signed the agreement. In such a situation, the union, as in *Peter Kiewit*, can file a Section 8(a)(5) (29 U.S.C. 158(a)(5)) charge, and the Board can determine, first, whether the companies are alter egos or a single employer and, second, whether the unit is appropriate. In some cases, a certified or currently recognized col-

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the federal courts should be empowered to decide them" (Pet. App. A52-A53).

lective bargaining representative might also file a unit clarification petition in order to obtain a Board ruling on whether employees of the allegedly separate employer should be under the contract. See 29 C.F.R. 102.60(b).

But such measures are not available to a union operating under a "prehire agreement"—an agreement that, under Section 8(f) of the Act, construction industry employers may enter into with minority unions. A Section 8(a)(5) charge would be dismissed where the union was merely a party to a Section 8(f) agreement and made no claim that it had established its majority, because an employer is free to repudiate a Section 8(f) agreement prior to the establishment of a union's majority. *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 345 (1978) (*"Higdon Contracting Co."*). See also *Jim McNeff, Inc.* v. *Todd*, No. 81-2150 (Apr. 27, 1983), slip op. 8. Nor would a unit clarification proceeding be available, because such petitions are cognizable only if there is "no question concerning representation." 29 C.F.R. 101.17.

The present case appears to involve a Section 8(f) agreement, and no one claims that the agreement has been converted to a Section 9(a) agreement by the attainment of majority status.[6] Thus, it appears that

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[6] As the court of appeals noted (Pet. App. A59), petitioners implicitly contend (Pet. 5-6 & n.1) that the Unions have never demonstrated majority status so as to convert the agreement into a Section 9(a) agreement. The Unions made no allegation of majority status in their complaint (Pet. App. E1-E14). Nor is it clear in this case whether, even assuming the Unions had demonstrated a majority at some time in the past, such a majority would continue to apply. When employees represent a relatively stable complement, a union that establishes a majority is thereafter entitled to a continuing presumption of majority on other construction projects undertaken by the

the unit appropriateness question could not readily be resolved through a Board unfair labor practice proceeding initiated by Section 8(a)(5) charges or through a unit clarification proceeding under Section 9(b) (29 U.S.C. 159(b)) of the Act.

c. In contrast to this case, none of the three decisions relied on by petitioners for a conflict in the circuits (Pet. 13-17) is a construction industry case. *Brotherhood of Teamsters Local No. 70* v. *California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982) (trucking company); *Local No. 3-193, Int'l Woodworkers* v. *Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) (timber industry); *Local Union No. 204, IBEW* v. *Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982) (electric utility). Although the court in each case concluded that, under *Peter Kiewit*, bargaining unit determinations should be left for the Board, none of the three panels was faced with a situation in which, as appears to be true here, the Board would not be able to make such a determination. Moreover, two of the cases are distinguishable on additional grounds. As the court below noted (Pet. App. A46-A47 n.12), the court in *Iowa Electric* viewed the union's Section 301 suit as a means of obtaining review of a representation issue that had already been passed on by the Board (668 F.2d at 419-420).[7] Similarly, as the court of appeals also noted

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employer. *Hageman Underground Construction*, 253 N.L.R.B. 60, 62 n.7 (1980). But, if the employer hires its employees on a project-by-project basis, and the composition of the workforce changes, the union must prove a majority on each project in order to make the contract immune to subsequent employer repudiation. *Ibid.*, citing *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977).

[7] In *Iowa Electric*, a dispute arose between the union and the employer over accretion of Quality Control Inspectors

(Pet. App. A54-A55), although the Ninth Circuit in *Ketchikan* stated that a court in a Section 301 suit lacks jurisdiction to enforce an accretion clause in an agreement (611 F.2d at 1299-1300), the court in that case in fact proceeded to declare—in a de facto ruling on the merits—that such an accretion clause would be unenforceable as applied to employees in the logging camps to which the union sought to extend the agreement (*id.* at 1301).

d. Finally, we believe that review of this case in its present interlocutory stage would be premature because the issue is not defined as well as it might be following the remand. The court of appeals instructed the district court on remand to apply the Board's approach in determining the appropriate bargaining unit (Pet. App. A66-A67). As the court of appeals explained (*id.* at A66), however, it is unclear at this point whether the Unions and the Funds would be able to establish that Halmar is an alter ego of Farnsworth; if they *do* establish alter ego status, then the district court's unit determination would be a very limited one. The Board does not undertake an independent community-of-interests inquiry—its standard test for the appropriateness of a bargaining unit—where alter ego employers are involved; rather, the Board limits its inquiry in those situations to whether

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("QCI's") into a contractually defined bargaining unit. The employer contended that QCI's were managerial or supervisory personnel not includable within the bargaining unit for "employees." The union filed an election petition with the Board, which upheld the union's position that the QCI's were employees, and the union was eventually certified as the bargaining representative for the QCI's. The employer then refused to bargain with the union, and the union, instead of filing a Section 8(a)(5) charge with the Board, brought a Section 301 action in federal court.

the contractual unit is repugnant to the policies of the Act. *Hageman Underground Construction*, 253 N.L.R.B. 60, 70 & n.12 (1980). See also *Young's Metal Fabricators & Roofing, Inc.*, 241 N.L.R.B. 978, 980, 983 (1979) (summary finding of unit appropriateness in alter ego case); *Crawford Door Sales Co.*, 226 N.L.R.B. 1144, 1151 (1976) (same).[8] Thus, it is as yet unclear whether the district court will be called upon to apply a unit test that implicates Board expertise to a greater degree than does the limited test applied in alter ego cases. Of course, if the district court finds that both the single employer *and* the alter ego allegations are unsupported, there would be no reason for the court to make *any* kind of unit determination.[9]

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[8] But see *Air-Vac Industries, Inc.*, 259 N.L.R.B. 336 (1981), in which the ALJ analyzed the appropriateness of the contractual unit under the community of interests test (*id.* at 340), although determining that the employer was both an alter ego of, *and* a single employer with, the signatory employer. *Id.* at 341.

The Board's broad deference to a contractually stipulated unit in alter ego cases is an application of the general rule that, when a union and an employer have agreed upon a particular unit, the Board will not disturb that agreement unless important policy reasons under the Act absolutely preclude such a unit. *The Tribune Co.*, 190 N.L.R.B. 398 (1971). Accord: *Mid-Jefferson County Hospital*, 259 N.L.R.B. 831 (1981). See also cases cited at Pet. App. A64-A65 n.17.

[9] Respondents, however, are wrong in suggesting (Br. in Opp. 6) that a court could enforce a prehire agreement in a Section 301 suit without reference to whether the bargaining unit as to which the agreement is enforced is one that contravenes policies of the National Labor Relations Act. Just as this Court in *Jim McNeff, Inc.* v. *Todd*, *supra*, examined the policies of the Act to ensure that none was violated by affirmance of the judgment enforcing the prehire agreement as to

The remaining questions presented in the petition likewise do not warrant review by this Court.

2. Contrary to petitioners' contention, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), does not stand for the proposition that "a prerequisite to a § 301 suit is an attempt to exhaust any existing grievance or arbitration procedure, whether mandatory or permissive" (Pet. 20-21). In *Maddox*, the Court specifically stated that a court suit would not be precluded "if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy." 379 U.S. at 657-658 (footnote omitted). Whether a particular dispute is subject to resolution under the contract grievance and arbitration procedure, and, if so, whether the parties intended arbitration to be an exclusive remedy, are matters of contract interpretation. In remanding on the exhaustion issue, the court of appeals merely determined that the meaning of *this* agreement's arbitration clause is ambiguous on the record here and that the district court therefore should not have granted summary judgment on the ground that exhaustion is required (Pet. App. A72-A73). The exhaustion issue is thus not ripe for review.

3. a. Petitioners, of course, do not contest the court of appeals' holding (Pet. App. A86) that most of their alleged efforts to encourage open shops and double-breasting are not actionable under the antitrust laws (see Pet. 24). Cf. *Associated General Contractors* v. *Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 7-8 ("*AGC*"). Petitioners do contend (Pet.

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the matters in question, so here it was proper for the court of appeals to direct the district court to consider the unit question *if* it finds that Farnsworth and Halmar either constitute a single employer or are alter egos.

24-25), however, that the court erred in holding that the complaint alleges an anti-competitive restraint in the market for carpentry subcontracting services, in violation of Section 1 of the Sherman Act.

Petitioners' argument rests in large part on their disagreement with the court of appeals' interpretation of the complaint as alleging an employer boycott of contractors who hire union workers and of contractors who do not create double-breasted union-nonunion operations (Pet. App. A86). There may be some merit to petitioners' claim that the complaint does not allege such a boycott. Paragraph 10(b) of the complaint, on which the court of appeals relied (Pet. App. A87), is "both brief and vague." *AGC*, slip op. 3. It does not in so many words allege a boycott or a concerted refusal to deal with unionized contractors (see Pet. App. E6). Nor does the complaint contain allegations of "coercion" against unionized contractors that this Court in *AGC*, on a comparable complaint, held were important to a finding that the boycott there was adequately pleaded. *AGC*, slip op. 8-9. On the other hand, paragraph 10(b)'s allegation of the defendants' intent "[t]o eliminate" the union by signing agreements with builders to "utilize contractors who do not have [union] agreements" (Pet. App. E6) arguably may, under very liberal pleading rules, adequately allege an employer boycott (see Pet. App. A86-A89). Whatever the proper interpretation of the complaint, however, this fact-bound issue, which turns on the particular allegations in a single complaint, is of no general importance and clearly does not deserve plenary review.

b. Moreover, insofar as petitioners argue (Pet. 25-28) that, even if the complaint adequately alleges an employer boycott of other employers, it is nonetheless

beyond the reach of the antitrust laws because of the labor exemption, they are wrong.[10]

Petitioners rest their claim to the statutory labor exemption largely on Section 20 of the Clayton Act (29 U.S.C. 52), which states that no injunction "shall prohibit any person or persons, whether singly or in concert * * * from ceasing to patronize or to employ any party to [a labor] dispute." But this argument ignores the nature of the antitrust allegations at issue here. The persons whom petitioners are accused of boycotting are not parties to any labor dispute; they are firms excluded from the contracting market because they happen to adhere to union contracts. Neither Section 20, nor any other statutory provision, has ever sheltered such a boycott. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474-477 (1921); *American Medical Association* v. *United States*, 317 U.S. 519, 536 (1943).

Petitioners' reliance (Pet. 25) on *United States* v. *Hutcheson*, 312 U.S. 219 (1941), is misplaced, for the Court there held only that, under the Clayton and Norris-LaGuardia Acts, a unilateral secondary boycott by a union is exempt from the antitrust laws. The Court, moreover, defined the exemption as available to the union only "[s]o long as [it] acts in its self-interest and does not combine with non-labor groups." 312 U.S. at 232 (footnote omitted). Thus, in *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797 (1945), the Court held that, whatever ex-

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[10] The United States recently addressed this subject at substantial length in its *amicus curiae* brief in *Associated General Contractors* v. *Carpenters* (No. 81-334, 1981 Term), at 12-22. We repectfully refer the Court to that brief for a full statement of our position. (We are sending copies of our *amicus curiae* brief to the parties in this case.)

emption the union might enjoy acting alone, it could claim no such exemption when it aided and abetted business groups who were violating the Sherman Act through an anticompetitive agreement. The group of employers charged in this case with boycotting other businessmen is surely no more entitled to a labor exemption than either the union or the business groups in *Allen Bradley*. See *H. A. Artists & Associates* v. *Actors' Equity Association*, 451 U.S. 704, 717 n.20 (1981).

Petitioners' further contention (Pet. 27) that they are entitled to a nonstatutory labor exemption is also incorrect. As the Court explained in *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, *supra*, 421 U.S. at 622, this exemption is derived from the policy of the federal labor laws favoring collective bargaining and the association of employees to eliminate competition over wages and working conditions. That policy, however, clearly is not served by permitting employer groups to pressure other employers outside the bargaining unit to give their contracting business to nonunion firms and thereby drive local unionized firms out of a portion of the subcontracting market. Indeed, as the court of appeals pointed out (Pet. App. A89), in *Connell* the Court held (421 U.S. at 623-625) that a union's agreement with general contractors not to deal with nonunion subcontractors was an interference with the subcontracting market not protected by the labor exemption; a similar agreement by a group of employers can surely fare no better.[11]

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[11] *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), relied on by petitioners (Pet. 27-28), is inapposite. The Court there held that a provision of a collective bargaining contract that affected product mar-

c. Finally, as is true with regard to the other questions presented in the petition, consideration of the antitrust issue would be premature. The court of appeals in this case remanded the antitrust claims to the district court for a determination whether the plaintiffs have standing to pursue them (Pet. App. A91). The standing issue, which was not raised below and which is not included in the petition, may be dispositive of the plaintiffs' antitrust claims.

Even before this Court's decision in *AGC*, the court of appeals was skeptical of the plaintiffs' standing (Pet. App. A90-A91). The *AGC* decision casts further doubt on the plaintiffs' standing. In *AGC*, which was an antitrust cause of action very much like this one, the Court concluded that the union was not a person injured by reason of a violation of the antitrust laws. In so concluding, the Court stressed that a number of relevant factors "weigh[ed] heavily" against judicial enforcement of the union's antitrust claim: "the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy * * *." *AGC*, slip op. 27. Without prejudging the district court's inquiry, we would only note here that there is a very substantial question as to plaintiffs' standing to bring

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ket competition but also had an "immediate and direct" effect on the employees' hours of work was entitled to the labor exemption. But there is no basis in either the plurality opinion of Justice White or the concurring opinion of Justice Goldberg for providing a labor exemption to a boycott by one group of employers against another merely because it is motivated by anti-union animus.

their antitrust action. Should the lower courts rule in favor of the plaintiffs on the standing issue, there will then be time enough for petitioners to seek review of that and the other antitrust issues presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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